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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIAN MELGOZA,

Defendant and Appellant.

H042719

(Monterey County  
Super. Ct. No. SS151117A)

**I. INTRODUCTION**

Defendant Julian Melgoza pleaded guilty to carrying a concealed, loaded, and unregistered firearm in a vehicle (Pen. Code, § 25400, subds. (a)(1) & (c)(6)).<sup>1</sup> The trial court suspended imposition of sentence and placed defendant on probation with various terms and conditions, including that he “[n]ot have access to, use, or possess any police scanner device.”

On appeal, defendant contends that the probation condition is unconstitutionally vague and overbroad. He also argues that a waiver of appellate rights in his waiver and plea agreement does not apply to the instant appeal, and that he did not make a knowing, intelligent, and voluntary waiver of his appellate rights.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

For reasons that we will explain, we determine that defendant's claims are not reviewable on appeal because of his waiver of appellate rights and his failure to obtain a certificate of probable cause. We will therefore dismiss the appeal.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### ***A. Complaint***

A loaded gun was found concealed in a car under defendant's direction or control. The gun was not registered to him. In July 2015, defendant was charged by complaint with carrying a concealed, loaded, and unregistered firearm in a vehicle (§ 25400, subds. (a)(1) & (c)(6); count 1), and misdemeanor giving false information to a police officer (§ 148.9, subd. (a); count 2).

### ***B. Waiver of Rights and Plea Agreement***

Defendant initialed and signed a waiver of rights and plea agreement on July 21, 2015, indicating that he was pleading guilty or no contest to count 1. Relevant here, defendant initialed a provision stating: "I will receive felony probation with up to one year in jail as a condition of probation. If I later violate probation, the Court can sentence me up to the maximum" of three years in county jail.

Regarding a waiver of appellate rights, defendant initialed a provision stating: "(Appeal and Plea Withdrawal Waiver) I hereby waive and give up all rights regarding state and federal writs and appeals. This includes, but is not limited to, the right to appeal my conviction, the judgment, and any other orders previously issued by this court. I agree not to file any collateral attacks on my conviction or sentence at any time in the future. I further agree not to ask the Court to withdraw my plea for any reason after it is entered."

Defendant also signed provisions that stated the following: "I offer my plea of guilty or no contest freely and voluntarily and of my own accord. No one has made any threats; used any force against me, my family, or loved ones; or made any promises to me, except as listed in this form, in order to convince me to plead guilty or no contest. . . .

[¶] I have read, or have had read to me, this form and have initialed each of the items that applies to my case. I have discussed each item with my attorney. By putting my initials next to the items in this form, I am indicating that I understand and agree with what is stated in each item that I have initialed. The nature of the charges, possible defenses, and the effects of any prior convictions, enhancements, and special allegations have been explained to me. I understand each of the rights outlined above and I give up each of them to enter my plea.”

Defendant’s trial counsel signed a provision in the agreement stating, “I have reviewed this form with my client and have explained each of the items in the form, including the defendant’s constitutional rights, to the defendant and have answered all of his or her questions concerning the form and the plea agreement. . . . [¶] I concur in the defendant’s decision to waive the above rights and enter this plea, and believe the defendant is doing so knowingly, intelligently, and voluntarily.”

### ***C. Plea Hearing***

At a hearing on July 21, 2015, the parties indicated to the trial court that they had reached a resolution. The court confirmed the parties’ agreement that defendant would be pleading guilty or no contest to count 1, that he would be placed on probation, and that he would plead guilty in a separate misdemeanor case. The court also stated to defendant: “You’ll be placed on the standard terms and conditions of felony probation for a period of three years.” The court later explained that the “[s]tandard terms and conditions of probation would include the term that you obey all laws. You’ll be subject to a full search clause, which means you will have to make your person, your place of residence, any personal property under your immediate control, and any vehicle under your control subject to search day or night, with or without probable cause. That search may be conducted by a peace officer or a probation officer.”

The trial court eventually asked defendant, “So do you understand all the terms that I stated?” Defendant responded affirmatively. The court asked defendant whether

“anyone made any promises to you other than what was just stated here in open court in order to get you to plead guilty or no[] contest?” Defendant responded, “No.”

In response to the trial court’s inquiry, defendant indicated that he had read the waiver and plea agreement before signing and initialing it, and that he understood its provisions. The court asked defendant, “Do you give up your right to appeal these convictions?” Defendant responded, “Yes.”

Defendant pleaded guilty to count 1, carrying a concealed, loaded, and unregistered firearm in a vehicle (§ 25400, subds. (a)(1) & (c)(6)). The remaining count was taken under submission for dismissal at the time of sentencing. Defendant also pleaded guilty to a misdemeanor count in another case. The trial court accepted defendant’s pleas and found that he knowingly, voluntarily, and intelligently waived his rights.

The trial court also signed defendant’s written waiver and plea agreement, finding that defendant “expressly, knowingly, understandingly, and intelligently waives [his] constitutional and statutory rights; the defendant’s plea, admissions, and waiver of rights are freely and voluntarily made; the defendant understands the nature of the charges and the consequences of the plea and admissions; and that there is a factual basis for the same. The Court accepts the defendant’s plea and admissions . . . .”

#### ***D. Probation Report***

According to the probation report, defendant admitted being an active Norteño gang member when he was booked into jail, and he was housed in a Norteño segregated jail pod. Defendant also had several gang related tattoos. When interviewed by the probation officer, defendant denied being a gang member but acknowledged he was an associate of the Norteño gang. The probation officer described defendant as an active gang member who was “in need of close supervision.” The probation officer recommended that defendant be placed on probation with “standard terms and conditions to include gang terms.” Within the recommended conditions expressly mentioning gangs

was the following condition referring to police scanners: “Not have access to, use, or possess any police scanner device or surveillance equipment on your person, vehicle, place of residence, or personal effects.”

#### ***E. Sentencing***

A sentencing hearing was held on August 20, 2015. Defendant indicated that he wanted to be heard regarding probation conditions. The trial court stated, “Just to let you know, I am modifying [the police scanner condition] so that it just reads . . . do not have access to, use, or possess any police scanners.” Defendant proceeded to object to the probation conditions that expressly referred to gangs, as well as to certain other conditions that were listed within the series of gang conditions, including the police scanner condition. Defendant argued that there was no “nexus” between “those gang conditions” and his offense, which involved him being in a car with his girlfriend. The prosecutor argued that defendant had identified himself as an associate of the Norteño gang and that in order to successfully complete probation defendant should no longer associate with members of the gang. The court observed that defendant was housed with Norteños in jail. The court continued the matter for a further hearing the next day.

At the continued hearing on August 21, 2015, defendant reiterated his argument that the gang conditions were unreasonable. To the extent the trial court intended to impose them, defendant requested “minimal gang conditions.” Defendant indicated that he did not object to the police scanner condition as modified by the court at the prior hearing. The court indicated that it was going to impose most of the recommended gang conditions.

The court proceeded to suspend imposition of sentence and place defendant on probation for three years with various terms and conditions. Condition No. 18 precluded defendant from possessing police scanners as follows: “Not have access to, use, or possess any police scanner device.” The remaining count was dismissed. The court also sentenced defendant in a separate case involving a misdemeanor conviction.

Defendant filed a notice of appeal but did not obtain a certificate of probable cause.

### **III. DISCUSSION**

Defendant contends that the probation condition prohibiting his access to a police scanner device is unconstitutionally vague and overbroad, and that it should therefore be modified. He also argues that his contention has not been forfeited by his failure to raise it below. Defendant further contends that his waiver of appellate rights in his waiver and plea agreement does not apply to the instant appeal, and that he did not make a knowing, intelligent, and voluntary waiver.

The Attorney General contends that defendant waived his right to appeal and therefore he cannot challenge the probation condition. The Attorney General also contends that defendant's challenge to the probation condition and his claim that his appellate waiver was not made knowingly are attacks on the validity of his plea agreement. As such, a certificate of probable cause is required and defendant's failure to obtain one requires dismissal of the appeal. The Attorney General further argues that defendant is estopped from challenging the probation condition, and that on the merits the probation condition is not unconstitutional.

We determine that defendant's waiver of his appellate rights and his failure to obtain a certificate of probable cause are dispositive and therefore we consider those issues first.

#### ***A. Scope of Appellate Waiver***

"A defendant may waive the right to appeal as part of a plea bargain where the waiver is knowing, intelligent and voluntary. [Citation.]" (*People v. Mumm* (2002) 98 Cal.App.4th 812, 815 (*Mumm*), citing *People v. Panizzon* (1996) 13 Cal.4th 68, 80 (*Panizzon*)). "[A] waiver that is nonspecific, e.g., 'I waive my appeal rights' or 'I waive my right to appeal any ruling in this case,' " is considered a general waiver. (*Panizzon*, *supra*, at p. 85, fn. 11.) "A broad or general waiver of appeal rights ordinarily includes

error occurring before but not after the waiver because the defendant could not knowingly and intelligently waive the right to appeal any unforeseen or unknown future error. [Citation.] Thus, a waiver of appeal rights does not apply to ‘ “possible future error” [that] is outside the defendant’s contemplation and knowledge at the time the waiver is made.’ [Citations.]” (*Mumm, supra*, at p. 815.)

In *Panizzon*, the California Supreme Court addressed the scope of a sentencing-specific appellate waiver and its effect on a defendant’s right to appeal. In *Panizzon*, the defendant pleaded no contest pursuant to a plea bargain that provided for a sentence of life with the possibility of parole, plus 12 years. (*Panizzon, supra*, 13 Cal.4th at p. 73.) In the written waiver and plea agreement, the defendant agreed that he was waiving his “right to appeal from the sentence [he would] receive in this case.” (*Id.* at p. 82.) The defendant later challenged the sentence on the ground that it was disproportionate to the sentences his codefendants had received after him, and that therefore his sentence constituted cruel and unusual punishment. (*Id.* at pp. 74, 85.) The defendant also argued that the sentencing error was unforeseen or unknown at the time of his plea and appellate waiver, and that such future sentencing error was beyond the scope of his waiver. (*Id.* at p. 85.)

The California Supreme Court determined that defendant’s claim fell within the scope of the appellate waiver and was not reviewable on appeal. (*Panizzon, supra*, 13 Cal.4th at p. 89.) The court explained: “Not only did the plea agreement in this case specify the sentence to be imposed, but by its very terms the waiver of appellate rights also specifically extended to any right to appeal such sentence. Thus, what defendant seeks here is appellate review of an integral element of the negotiated plea agreement, as opposed to a matter left open or unaddressed by the deal.” (*Id.* at pp. 85-86.) The court further stated that “both the length of the sentence and the right to appeal the sentence are issues that cannot fairly be characterized as falling outside of defendant’s contemplation and knowledge when the waiver was made.” (*Id.* at p. 86.) The court contrasted the case

before it to cases in which the defendants had made a general waiver of the right to appeal as part of a negotiated plea agreement and were not barred from appealing subsequent sentencing errors where the sentencing issue had been left unresolved by the particular plea agreements involved.

In the instant case, the parties resolved the disposition of defendant's case, and the waiver and plea agreement expressly provided that defendant would receive probation. The agreement also clearly indicated that defendant would be subject to probation conditions, based on the reference to jail time as a condition of probation and the reference to the consequence of defendant violating probation.

Significantly, defendant's appellate waiver in the waiver and plea agreement was not a general waiver, but a specific waiver that applied to any direct or collateral attack on the sentence or judgment. The agreement expressly provided that defendant was waiving "*all rights* regarding state and federal writs and appeals. This includes, but is not limited to, the *right to appeal* [his] conviction, *the judgment*, and any other orders previously issued by this court." (Italics added.) Defendant also agreed "*not to file any collateral attacks* on [his] *conviction or sentence* at any time in the future." (Italics added.)

Thus, in view of the express language in the waiver and plea agreement, the parties clearly contemplated that defendant would be placed on probation with conditions, and they clearly contemplated a waiver of the right to appeal from the "judgment." A "judgment" includes a probation order for purposes of a defendant's right to take an appeal. (§ 1237, subd. (a); accord, *People v. Howard* (1997) 16 Cal.4th 1081, 1087 (*Howard*).) Consequently, based on the references to probation conditions in defendant's plea agreement and to a judgment in the appellate waiver, we believe the parties contemplated at the time defendant entered his guilty plea that the waiver would apply to future error, including error with respect to the grant of probation and the conditions of probation. (See *Panizzon, supra*, 13 Cal.4th at pp. 85-86; *Mumm, supra*,



98 Cal.App.4th at p. 815; *People v. Buttram* (2003) 30 Cal.4th 773, 791-793 (conc. opn. of Baxter, J.) (*Buttram*) [if the defendant’s plea bargain had included an appellate waiver regarding sentencing, then the appellate court could have declined to address the defendant’s claim that the trial court abused its discretion in imposing the negotiated maximum sentence].)

Defendant contends that the trial court at the change-of-plea hearing referred to him being placed on probation with “[s]tandard terms and conditions,” but that the court did not advise him that a restriction regarding police scanners would be a condition of probation. Defendant also contends that the parties “reasonably expected” the imposition of only constitutional probation conditions.

We are not persuaded by defendant’s arguments regarding what the parties’ contemplated and the scope of the appellate waiver. Although the trial court used the phrase “[s]tandard terms and conditions of probation,” the trial court never stated that the terms and conditions of defendant’s probation would be *limited* to the conditions specifically stated by the court at the hearing. Rather, the court explained that “[s]tandard terms and conditions of probation would *include*” the conditions stated by the court at the hearing.

Regarding the *grounds* for challenging a probation condition, nothing in defendant’s written appellate waiver indicates that the parties contemplated an exception for appellate claims based on constitutional grounds. Rather, defendant agreed to “waive and give up *all rights* regarding state . . . writs and appeals. This includes, but is not limited to, the right to appeal [the] conviction, [and] the judgment . . . .” Thus, based on the language of the written waiver, the parties clearly contemplated that *all* appellate challenges to the judgment or order of probation would be waived.

In sum, defendant’s appellate challenge on constitutional grounds to the police scanner condition is not reviewable on appeal because the terms of the plea bargain

preclude any appeal regarding the conditions of probation. (See *Panizzon, supra*, 13 Cal.4th at p. 89; *Mumm, supra*, 98 Cal.App.4th at p. 815.)

**B. Requirement of Certificate of Probable Cause**

Defendant contends that the record fails to establish he made a knowing, intelligent, and voluntary waiver of his appellate rights. He argues that neither the written waiver and plea agreement, nor the trial court, indicated that a police scanner condition might be imposed or that he would be precluded from challenging an unconstitutional probation condition. He contends that a certificate of probable cause is not required for his challenge to the appellate waiver.

The Attorney General contends that defendant's claim is an attack on the validity of a portion of the plea agreement – the appellate waiver. The Attorney General contends that defendant may not raise this claim because he did not obtain a certificate of probable cause.

In general “a court may rely upon a defendant's validly executed waiver form as a proper substitute for a personal admonishment. [Citations.] ‘Only if in questioning the defendant and his [or her] attorney the trial court has reason to believe the defendant does not fully comprehend his [or her] rights, must the trial court conduct further canvassing of the defendant to ensure a knowing and intelligent waiver of rights.’ [Citations.] Thus, in *People v. Castrillon* [(1991) 227 Cal.App.3d 718], a trial court was not required to question a defendant specifically regarding the right to appeal where both the defendant and his attorney had signed a waiver form and had attested to the defendant's knowing and voluntary relinquishment of his rights and where the trial court's examination of the defendant and his attorney raised no questions concerning defendant's comprehension of his rights and of the consequences of his plea. [Citations.]” (*Panizzon, supra*, 13 Cal.4th at pp. 83-84.)

In this case, defendant's appellate waiver is contained in his written plea agreement. “It has long been established that issues going to the validity of a plea require

compliance with section 1237.5. [Citation.]” (*Panizzon, supra*, 13 Cal.4th at p. 76.) Under section 1237.5, a defendant may not appeal from a judgment of conviction following a guilty or no contest plea unless the defendant files with the trial court a written statement “showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings,” and the “trial court has executed and filed a certificate of probable cause for such appeal.” (*Id.*, subds. (a), (b).) “The purpose for requiring a certificate of probable cause is to discourage and weed out frivolous or vexatious appeals challenging convictions following guilty and nolo contendere pleas. [Citations.]” (*Panizzon, supra*, at p. 75.) If a defendant fails to obtain a certificate when one is required, the defendant’s claim is not reviewable on appeal. (*Id.* at p. 89.)

Two types of issues may be raised in an appeal from a guilty or no contest plea without a certificate of probable cause: (1) “[t]he denial of a motion to suppress evidence under Penal Code section 1538.5,” and (2) “[g]rounds that arose after entry of the plea and do not affect the plea’s validity.” (Cal. Rules of Court, rule 8.304(b)(4)(A), (B); see *People v. Mashburn* (2013) 222 Cal.App.4th 937, 941-942 (*Mashburn*).)

“In determining whether section 1237.5 applies to a challenge of a sentence imposed after a plea of guilty or no contest, courts must look to the substance of the appeal: ‘the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.’ [Citation.] Hence, the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5. [Citation.]” (*Panizzon, supra*, 13 Cal.4th at p. 76.)

For example, “a challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself. Therefore, it [is] incumbent upon defendant to seek and obtain a probable cause certificate in order to attack the sentence on appeal.” (*Panizzon, supra*, 13 Cal.4th at p. 79.) “Similarly, a

certificate is required when a defendant claims that warnings regarding the effect of a guilty plea on the right to appeal were inadequate. [Citation.]” (*Id.* at p. 76.)

Significantly, in *Panizzon*, the California Supreme Court stated that a certificate of probable cause is required for a claim that the defendant “was inadequately admonished regarding the waiver of appellate rights contained in the waiver and plea agreement.” (*Panizzon*, *supra*, 13 Cal.4th at p. 76, fn. 6; see § 1237.5.) Subsequently, in *Buttram*, Justice Baxter explained in a concurring opinion that if a plea bargain includes an express waiver of appeal, then a certificate of probable cause is required to challenge either the sentence or the enforceability of the waiver, including on the ground that the waiver was not made knowingly. (*Buttram*, *supra*, 30 Cal.4th at pp. 792-793 (conc. opn. of Baxter, J.)) Thereafter, an appellate court, citing *Panizzon* and Justice Baxter’s concurrence in *Buttram*, held that where the defendant’s appeal challenged the validity of the appellate waiver in the plea bargain, the appeal was a challenge to the validity of the plea itself and a certificate of probable cause was required. (*Mashburn*, *supra*, 222 Cal.App.4th at p. 943.)

In this case, a certificate of probable cause is required for defendant’s claims that he was not adequately admonished by the trial court, or that he did not otherwise knowingly, intelligently, and voluntarily waive his right to appeal a police scanner condition or a purportedly unconstitutional probation condition. (*Panizzon*, *supra*, 13 Cal.4th at p. 76, fn. 6; *Buttram*, *supra*, 30 Cal.4th at pp. 792-793 (conc. opn. of Baxter, J.); *Mashburn*, *supra*, 222 Cal.App.4th at p. 943.) The record reflects that defendant did not seek and obtain a certificate of probable cause. We therefore determine that these claims attacking the validity of defendant’s appellate waiver in the waiver and plea agreement are not reviewable on appeal. (*Panizzon*, *supra*, at p. 89.)

In sum, we determine that defendant’s waiver of the right to appeal the “judgment” includes a waiver of the right to appeal the order of probation. (See § 1237, subd. (a); *Howard*, *supra*, 16 Cal.4th at p. 1087.) Defendant thus waived his right to

challenge his probation conditions on appeal. (See *Panizzon, supra*, 13 Cal.4th at pp. 85-86; *Mumm, supra*, 98 Cal.App.4th at p. 815; *Buttram, supra*, 30 Cal.4th at pp. 791-793 (conc. opn. of Baxter, J.).) Further, we determine that defendant's challenge to the appellate waiver, on the grounds that it was not knowing, intelligent, and voluntary, is an attack on the validity of his plea. In the absence of a certificate of probable cause, defendant may not raise this issue on appeal. (*Panizzon, supra*, 13 Cal.4th at pp. 76, fn. 6, 89; *Buttram, supra*, 30 Cal.4th at pp. 792-793 (conc. opn. of Baxter, J.); *Mashburn, supra*, 222 Cal.App.4th at p. 943.) We will therefore dismiss the appeal.

#### **IV. DISPOSITION**

The appeal is dismissed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.